DOCUMENT RESUME

ED 233 490 EA 016 055

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TITLE A Fair Tribunal: Governing Board Bias and the Power to Decide.
PUB DATE Aug 81
NOTE 28p.; Paper presented at the Annual Meeting of the National Conference of Professors of Educational Administration (35th, Seattle, WA, August 16-21, 1981).
PUB TYPE Legal/Legislative/Regulatory Materials (090) -- Speeches/Conference Papers (150)

EDRS PRICE MF01/PC02 Plus Postage.
DESCRIPTORS Administrators; Board Administrator Relationship; *Boards of Education; *Court Litigation; *Due Process; Elementary Secondary Education; *Governance; *Governing Boards; Higher Education; Student Rights; Superintendents; Teacher Dismissal; Teacher Rights
IDENTIFIERS Hortonville School Dist v Hortonville Educ Assn; Simard v Board of Education; Withrow v Larkin

ABSTRACT

This paper presents examples of judicial reasoning in conflicts involving governing board bias and the power to decide in higher education and in various public school settings. Two cases, "Simard v. Board of Education" and "Hortonville Joint School District No. 1 v. Hortonville Education Association," provide the general principle of leaving employment decisions to educational governing boards unless actual bias is shown to exist. "Withrow v. Larkin" sets forth the basic proposition that mere exposure to evidence is not enough to overcome the presumption of administrative fairness. Two cases involving terminations in higher education follow these general principles. Five other cases illustrate the allowable extent of local school board involvement in initiating termination proceedings against a teacher and the kind of showing required to establish a charge of board bias. Three further cases illustrate judicial reasoning in conflicts between superintendents and boards of education regarding the initiation of termination proceedings and the inherent biases of unsatisfactory superintendent/board relationships. Although courts are generally reluctant to disquality governing boards from acting, the paper concludes that cases are adjudicated on their own merits. Thus boards of education and administrators should strive to provide fair procedures that promote reasonable decisions. (PB)

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August, 1981

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A FAIR TRIBUNAL:

GOVERNING BOARD BIAS AND THE POWER TO DECIDE

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I. INTRODUCTION

Among the many functions of the governing board of an educational institution is that of sitting as a tribunal to decide certain matters involving staff and students. If such a quasi-judicial proceeding is to be truly meaningful, then the board must act fairly. However, there may be a conflict if the governing board is biased and also has the power to decide. It is the purpose of this paper to examine how the courts have resolved this issue.

The issue of an unfair tribunal has been raised in many cases. The decisions included in this paper were selected because they provide some of the better examples of judicial reasoning as the courts have resolved the conflict involved with governing board bias and the power to decide. The case notes are organized to first provide a background of the general principles involved and to then illustrate the application of the principles in a variety of educational settings.

II. NOTES ON SELECTED CASES

General Principles

An illustration of some of the basic issues concerning governing board bias and the power to decide is provided by Simard v. Board of Education, 473 F.2d 988 (2nd Cir. 1973). Simard, a high school language teacher, had been denied tenure by the decision of the board of education not to renew his one-year contract. He had then brought suit in federal court, alleging that his constitutional

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rights had been violated by this action and seeking injunctive relief. The district court had concluded that Simard was not entitled to relief and the circuit court of appeals affirmed. Id. at 990.

For the three years of his employment, Simard had been an active member of the education association that negotiated with the board of education. He had served as an officer in the association and as chief negotiator during negotiations for the 1971-72 contract. In February 1971 he had been notified by the superintendent that his contract would not be renewed for the coming year for reasons of insubordination and other due and sufficient cause. Id. at 990-91.

Upon Simard's request and as authorized by state statute, the board conducted a hearing on the superintendent's decision not to renew the contract. After the hearing the board had concluded that there were adequate grounds for the superintendent's decision to not renew the contract. The board had emphasized that the decision had not been influenced by Simard's negotiation activities. Id. at 991.

Simard contented on appeal that the board had deprived him of both procedural and substantive due process and that it had unconstitutionally penalized him for his exercise of rights protected by the first amendment. Assuming for purposes of argument only that the fourteenth amendment guarantee of due process applied in this situation, the court analyzed the procedural due process claim, noting that "[t]he very nature of due process negates any concept of inflexible procedures universally applicable to every imaginable situation." Id. at 992.

Simard claimed that the board of education had been an insufficiently neutral decisionmaker. He argued that in his capacity as bargaining representative he had engaged in heated negotiations with four members of the board, who had then compromised their impartiality toward him. Id. at 993.

The court noted that an impartial decisionmaker is a basic constituent of due process and that any other collateral procedural guarantees are largely meaningless if the deciding tribunal has in some way adversely prejudged the merits of the case. However, the court declined to mandate individual disqualifications under the circumstances of this case. Id.

> School boards frequently negotiate with teachers in their capacity as bargaining representatives. The constitutional rule sought here would require that decisions as to teacher competence be surrendered to a body less familiar with relevant considerations and not responsible under state and local law for making these decisions. Moreover, it is unrealistic to require a Connecticut town to provide more than one body to deal with various aspects of school administration. We do not believe that due process, varying as it does with differing factual contexts, requires so much in this case, absent a showing of actual, rather than potential, bias. Id.

Simard also claimed that the board had prejudged the merits of his case three weeks before the hearing when, according to the minutes of the meeting, it "concurred" in the superintendent's initial non-renewal decision. However, it was found that no actual board vote had been taken at that time and the members had only agreed with the superintendent's recommendation, and that such a decision would initially be communicated to the board in the normal course of school administration, well before any hearing on the merits. The court believed that the very limited nature of such a prior involvement by the school board was entirely consistent with due process. Id.

Not only do governing boards proceed on the recommendations and facts provided by administrators, but in some instances a board may find it necessary to conduct its own preliminary investigation into a matter. Withrow v. Larkin, 421 U.S. 35 (1975) is a leading case on the issue of whether a combination of investigative and adjudicative functions in an administrative agency is permissible.

The Wisconsin statutes, which had prohibited various acts of professional misconduct by physicians, had empowered a state examining board to conduct

investigative hearings into alleged misconduct and to then hold a hearing to determine whether, based on the evidence adduced at the hearing, the physician's license would be suspended. The examining board had initiated such proceedings against Dr. Larkin, and he had then sued in federal court for injunctive relief, alleging that the statutes were unconstitutional. Id. at 37-39.

The issue which had been addressed by the district court was whether it was a denial of procedural due process for the board to temporarily suspend a license at its own contested hearing on charges that evolved from its own investigation. The three-judge court had believed that such a procedure would be unconstitutional and had issued a preliminary injunction. Id. at 46. The Supreme Court reversed in a unanimous decision. Id. at 59.

> Concededly, a "fair trial in a fair tribunal is a basic requirement of due process." . . . This applies to administrative agencies which adjudicate as well as to courts. . . . Not only is a biased decisionmaker constitutionally unacceptable but "our system of law has always endeavored to prevent even the probability of unfairness." . . . In pursuit of this end, various situations have been identified in which experience teaches that the probability of actual bias on the part of the judge or decisionmaker is too high to be constitutionally tolerable. Among these cases are those in which the adjudicator has a pecuniary interest in the outcome and in which he has been the target of personal abuse or criticism from the party before him. Id. at 46-47.

> The contention that the combination of investigative and adjudicative functions necessarily creates an unconstitutional risk of bias in administrative adjudication has a much more difficult burden of persuasion to carry. It must overcome a presumption of honesty and integrity in those serving as adjudicators; and it must convince that, under a realistic appraisal of psychological tendencies and human weakness, conferring investigative and adjudicative powers on the same individuals poses such a risk of actual bias or prejudgment that the practice must be forbidden if the guarantee of due process is to be adequately implemented. Id. at 47.

The Court acknowledged that this was not to say that there was nothing to the argument that those who have investigated should not then adjudicate. It was noted that although the issue was substantial and had received much attention,

the growth, variety, and complexity of the administrative processes had made any one solution or organizing principle very unlikely. Id. at 51.

The Court said that, although it was necessary to be alert to the possibilities of bias that may lurk in the way particular procedures actually work in practice, the procedures that had been used by the board had not in themselves contained an unacceptable risk of bias. There had been no specific evidence of bias or prejudice that would indicate that the board would have been unable to base its decision on the evidence to be presented at the contested hearing. Id. at 54-55.

> The mere exposure to evidence presented in nonadversary investigative procedures is insufficient in itself to impugn the fairness of the Board members at a later adversary hearing. Without a showing to the contrary, state administrators "are assumed to be men of conscience and intellectual disicpline, capable of judging a particular controversay fairly on the basis of its own circumstances." Id. at 55.

After the board had been prevented by the trial court from going forward with the contested hearing, it had determined that there was probable cause to believe that the physician had engaged in various prohibited acts and had filed its findings and conclusions with the district attorney for the purpose of initiating license revocation and criminal proceedings. This action had been stressed on appeal in an attempt to show prejudice and prejudgment, but the Court was not persuaded. Id. at 55-56.

> Indeed, just as there is no logical inconsistency between a finding of probable cause and an acquittal in a criminal proceeding, there is no incompatibility between the agency filing a complaint based on probable cause and a subsequent decision, when all the evidence is in, that there has been no violation of the statute. Here, if the Board now proceeded after an adversary hearing to determine that appellee's license to practice should not be temporarily suspended, it would not implicitly be admitting error in its prior finding of probable cause. Its position most probably would merely reflect the benefit of a more complete view of the evidence afforded by an adversary hearing. Id. at 57-58.

> The initial charge or determination of probable cause and the ultimate adjudication have different bases and purposes. The fact

> that the same agency makes them in tandem and that they relate to the same issues does not result in a procedural due process violation. Clearly, if the initial view of the facts based on the evidence derived from nonadversarial processes as a practical or legal matter foreclosed fair and effective consideration at a subsequent adversary hearing leading to ultimate decision, a substantial due process question would be raised. But in our view, that is not this case. Id. at 58.

The basic proposition set forth in Withrow, that mere exposure to evidence is not enough to overcome the presumption of administrative fairness, was generally followed by the Court in Hortonville Joint School District No. 1 v. Hortonville Education Ass'n, 426 U.S. 482 (1976). The issue was whether school board members, vested by state law with the power to employ and dismiss teachers, could consistent with the due process clause of the fourteenth amendment, dismiss teachers engaged in a strike prohibited by state law. Id. at 484.

After negotiations for the renewal of a collective bargaining contract had failed to produce agreement, the Hortonville teachers, who had been working without a contract, went on strike in violation of Wisconsin law. After efforts to get the teachers to return to their jobs had proved unsuccessful, the board of education had held disciplinary hearings and had then voted to terminate the employment of the striking teachers. Id. at 484-485.

The teachers had brought suit in state court, alleging that the termination procedures had not complied with due process. The trial court had dismissed the claim, but on appeal the state supreme court reversed. It had held that the due process clause required that the teacher's conduct and the board's response be evaluated by an impartial decisionmaker, that even where the facts are not disputed, an impartial decisionmaker should determine what action should be taken on the basis of those facts, and that the school board was not sufficiently impartial to make that choice. Id. at 485-86.

The Supreme Court of the United States reversed. Id. at 487. In its decision, the Court focused, first, on the nature of the bias attributed to the

board, and, second, on the nature of the interests at stake in the case. Id. at 491.

The Court found no evidence that the board members had had the kind of personal or financial stake in the decision that might create a conflict of interest or support charges of personal animosity. The only factor suggested to support the claim of bias was that the school board had been involved in the negotiations that had preceded and precipitated the striking teachers' discharge. Id. at 491-93.

The Court noted that participation in those negotiations had been a statutory duty of the board.

> Mere familiarity with the facts of a case gained by an agency in the performance of its statutory role does not, however, disqualify a decisionmaker. Nor is a decisionmaker disqualified simply because he has taken a position, even in public, on a policy issue related to the dispute, in the absence of a showing that he is not "capable of judging a particular controversy fairly on the basis of its own circumstances." Id. at 493.

The Court stated that the fourteenth amendment would have permitted the board to be stripped of its statutory power to discharge its employees only if the board's prior involvement with negotiations meant that it could not have acted consistently with due process. Id. at 494.

The Court noted that due process is a term that negates any concept of inflexible, universally applicable procedures, and that determining what process is due in a given setting requires a taking into account of the individual's stake in the decision as well as the state's interest in a particular procedure for making it. The teachers' interest was self-evident; they wished to avoid termination of their employment. Because the teachers admitted to being on strike, there was no possibility of error on that critical threshold issue. The government interest at stake was that of leaving such employment decisions to be made by the local board of education. Id. at 494-95.

The Court reasoned that this was not an adjudicative decision, but rather that this was a public policy question that the board was obligated to decide--what choice among alternative responses to a teachers' strike would best serve the public interest? The Court found important public policy interests in leaving such an employment decision with the board of education, and absent some showing of disqualifying bias, the prior involvement of the board in the events preceding the decision was not enough to overcome "the presumption of honesty and integrity in policymakers with decisionmaking power." Id. at 495-97.

The dissenting opinion agreed with the proposition that mere familiarity with the facts of the case gained by an agency in the performance of its statutory role does not disqualify a decisionmaker. However, the dissenters did believe that there was a constitutionally unacceptable risk of bias where board members are required to assess the reasonableness of their own actions when determining what sanction to impose on the teachers. Id. at 498-99.

Higher Education

The general principle of leaving employment termination decisions to educational governing boards, absent a showing of actual bias, that had been established in Simard, supra, and Hortonville, supra, was followed in two decisions involving higher education.

Bignall v. North Idaho College, 538 F.2d 243 (9th Cir. 1976) involved a college instructor whose contract had not been renewed. The action had apparently been the result of a decision by the college board of trustees to cut two teaching positions because of a decline in student enrollment. The instructor and her husband had sued in federal court, contending that her termination was in retaliation for her husband's activities in behalf of

minority students at the college, activities which were protected by the first amendment. Id. at 245.

The court had ordered the college board to provide a hearing, but the Bignalls had withdrawn from the hearing over a procedural matter. The court had then found that, although she was de facto tenured, she had waived her right to further administrative due process and that the college had declined to renew her contract for valid nondiscriminatory reasons. Id. The circuit court of appeals affirmed, concluding that adequate due process had been provided and that the nonrenewal had been for permissible reasons. Id. at 250.

One of the contentions on appeal was that the board of trustees had been a biased panel, because it had ordered the cut in staff and had been concerned with the financial operation of the college. The court pointed out that the Bignalls had given no facts to show the prejudice of the board, but had simply assumed that any board in a like position would be biased and that therefore the hearing would be constitutionally inadequate as a matter of law. The court did not accept that position.

> While the risk of error with a biased hearing panel is obvious, courts have balanced the need for an objective decisionmaker against the costs of employing outside people, administrative efficiency and the body's having some expertise in institutional structure. Id. at 247.

In Megill v. Board of Regents, 541 F.2d 1073 (5th Cir. 1976), a university professor had been given notice by the university president that he would not be recommended for tenure. Megill had then taken his case to the board of regents, who had sole statutory responsibility for granting tenure. The board had decided not to grant tenure, basing its decision on a record made before a hearing examiner and a report from a three-member ad hoc committee of board members who had heard the oral arguments of both the administration and the professor. Id. at 1077.

Megill had then brought a civil rights action against the board of regents, claiming that he had been deprived of his constitutional rights of free speech and due process. The district court had denied relief, and the court of appeals affirmed. Id. at 1076.

One of the issues on appeal was whether due process had been denied because certain board members failed to recuse themselves for prejudice. At an earlier meeting of the board of regents, Megill had delivered a statement on behalf of the teachers' union local of which he was president, objecting to a proposal for faculty evaluation and the way that it had been developed. The truthfulness of his statement had been challenged by the president of the board. Because this incident had been one of the reasons on which the board relied to support denial of tenure, Megill claimed that the board was not impartial and all members but one who had been absent at that prior meeting should have recused themselves from participation in the decision. Id. at 1079.

The court acknowledged that an impartial decisionmaker is a basic constituent of due process, but refused to adopt any per se rule disqualifying hearing bodies, absent support in the record of actual partiality. Megill had deposed seven board members. None had been shown to have been biased by Megill's prior appearance before the board; all had reported that they had not become familiar with the case until it was before the board for review of tenure. There was no evidence to the contrary, and the record did not disclose the actual bias needed for disqualification. Id.

The court cited Hortonville and Simard for the general principle that there are significant policy reasons for having such employment matters decided by the governing board. The court also made a point of noting that the board's position in this controversy was not that of an adjudicator of a contest between

the university president and the professor, but rather that of a decisionmaker regarding the granting or denial of tenure. Id.

Public School Teachers and Students

There are two questions which frequently arise in regard to the fairness of a local school board. First, to what extent is it permissible for a board to become involved in the initiation of termination proceedings against a teacher; and, second, what kind of showing is required to establish that a board is unfairly biased? The following cases illustrate how some courts have resolved these issues.

Schneider v. McLaughlin Independent School District No. 21, 241 N.W.2d 574 (S.D. 1976) was an appeal by an elementary school principal whose contract had not been renewed by the school board. At a regular monthly meeting of the board, a signed statement from the elementary school faculty regarding problems with the elementary school administration had been presented to the board by the superintendent. The members of the board had discussed the contents of the statement and had reviewed the contents of the principal's personnel file with the superintendent. The board had then notified the principal of its intention not to renew his contract for the following year. As provided by statute, he had been provided both informal and formal hearings before the board, and the board had then decided to terminate his employment at the end of the school year. Id. at 575-76.

The principal then brought an action to review the board's decision. The circuit court upheld the board's action and the state supreme court affirmed. Id. at 575.

The principal contended on appeal that he had been deprived of his due process right to a hearing before a fair and impartial tribunal, claiming that

the board had completely prejudged the merits of his case at the time the decision was made to initiate the termination proceedings. The court rejected that contention. Id. at 577.

The court agreed that the principal had been entitled to a fair and impartial consideration, but did not believe that his right to such a tribunal had not been honored.

> [The statute] requires a school district board to notify a teacher of its intention not to renew the teacher's contract. Appellant does not explain how a school board is to notify a teacher of its intention not to renew his contract without somehow first deciding that facts exist that make it prudent for the board to consider the advisability of dispensing with a teacher's services for the following year. It would be a strange practice indeed for a school board to send a teacher a notice of intention of nonrenewal without at least first considering the advisability of not renewing the contract, unless, of course, the matter of nonrenewal is to spring pristine to the attention of the board for the first time at the conference held following the notice of intention not to renew. If the requirements of a fair tribunal include the condition that the members of the board must have had absolutely no prior knowledge of the facts that might make it advisable not to renew a teacher's contract and that they must have not discussed the matter and not have formed at least some tentative opinion that the teacher's contract not be renewed prior to the conference with the teacher, then as a practical matter the nonrenewal provisions of the continuing contract law are not available to a school board. We conclude that it is sufficient to meet the requirements of a fair tribunal that the board base its decision upon competent, credible evidence and that there be no evidence of actual bias toward the teacher whose contract is not being renewed. Any other holding would require that the post-notice conference be conducted by an independent hearing examiner or board. We agree . . . that such a constitutional rule is neither desirable nor necessary. Id.

The court thought that the limited prior involvement of the board was consistent with due process and found nothing in the record to overcome the presumption that the board acted fairly and impartially. Id. at 578.

Ferguson v. Board of Trustees of Bonner County School District No. 82, 564 P.2d 971 (Idaho 1977) involved the statutory and constitutional adequacy of the notice and hearing afforded a teacher who was discharged for cause by the school district board of trustees. At a regular meeting the school

district administrator had recommended to the board that the teacher be discharged for certain specified causes. Based on the showing of grounds for discharge put forth by the administrator, the board had issued a resolution for discharge. There was no record of what information had been placed before the board. Id. at 573.

Ferguson had been granted a hearing at his request. However, he had made it clear at the outset of the hearing that he would not participate, because he believed that the board had already made up its mind. He had stated that the resolution sounded conclusive to him and that he assumed that the board had already heard all the evidence against him. It had then been stated on behalf of the board that no decision had been made and that that was the purpose of the hearing. Nevertheless, the teacher had walked out before any evidence relating to the cause for discharge had been presented. After some discussion, the board had concluded that no evidence should be put on against the teacher since he was not present. The board had then voted unanimously to discharge. Id. at 573-74.

Ferguson had then petitioned the district court for reinstatement, but the requested relief had been denied. It was found that the school board had substantially complied with the discarge procedures established by statutes and state board regulations and that the notice and hearing had been constitutionally adequate. Id. at 974. The state supreme court affirmed. Id. at 978.

Ferguson alleged on appeal that the board had attended the hearing with a biased frame of mind because it had already received evidence of grounds for his discharge. The court rejected that argument, citing with approval from decisions of the Supreme Court of Colorado

> [We] believe that the board may properly conduct a limited preliminary inquiry to determine if there is any real substance to the charge against the teacher. The formal hearing process can be both time-

> consuming and costly, and may subject a teacher to great embarrassment. These adverse consequences may be avoided by a measure of pre-hearing familiarity with the case. Id. at 977.

and the Supreme Court of California.

> We find nothing improper in the conduct of the members of the board. . . . It is . . . clear that, before there is any occasion for a public hearing, the board must make an ex parte determination that there is good cause for dismissal, and, in order to be able to make this decision, the board must have knowledge of the facts. Id. at 977.

The court also found support in Hortonville and Withrow for the proposition that familiarity with the facts will not disqualify a decisionmaker, absent a showing of actual bias. Id. at 977-78. It was concluded that

> There is no indication in this record of actual bias brought about by the school board's earlier determination that the school administrator had demonstrated to the board cause for discharge of Ferguson, and therefore we conclude that the action of the school board in preliminarily determining that sufficient cause for discharge existed (in order to give Ferguson notice) did not violate due process. Id. at 978.

An example of circumstances that can lead to a finding of an unfair tribunal was provided by Keith v. Community School District of Wilton, 262 N.W. 2d 249 (Iowa 1978). It held that where the school board had initiated the termination proceedings, it could not act as an impartial decisionmaker to which the teacher was entitled.

Keith had taught vocational agriculture in the school district for twenty-one years. There was no record of any problems with his teaching performance until the later years of his employment. Apparently, his difficulties had begun only after he had served as president of the teachers' association and had been involved in negotiations with the board. Prior to this controversy, there had been two other termination proceedings commenced against him, but both had ended in compromise settlements. During the months just before the termination decision, there had been expressions of dissatisfaction with the vocational agriculture program voiced at board meetings. The board had then

voted to notify the teacher of its intention to terminate his teaching contract, even though there had been no administrative recommendation for termination. Id. at 250-51.

At his request, Keith had received a private conference with the board, a written statement of reasons, which generally recited the board's dissatisfaction with the teacher and his vocational agriculture program, and a public hearing before the board of education. Of the many people who spoke at the hearing, only a few had spoken against Keith's retention. No evidence had been produced at the hearing but some board members had made comments. The teacher and his representatives had made such statements as they wished. At the conclusion of the hearing, the board had voted unanimously for termination. Id. at 251-53.

Keith's suit against the board, in which he had contested his dismissal on several grounds, had been dismissed by the circuit court. Id. at 250. However, the supreme court reversed and remanded. Id. at 262.

An issue on appeal was whether a school board in a termination proceeding, which was conducted according to a specific Iowa statute, could act as a prosecutor, judge, and jury by instigating and carrying through such proceeding on its own motion. The court held that, under the specific statute, a non-tenured teacher was entitled to a hearing before an impartial tribunal, and that this the teacher had not been afforded. Id. at 258.

The court noted that a fair trial in a fair tribunal is a basic requirement of due process. It was pointed out that the critical determination in assessing the charge of partiality in a decisionmaker is whether in weighing the evidence he is required to call on his own personal knowledge and impression of what occurred. In such cases the individual would be deprived of his

right to examine or cross-examine a critical witness and the decisionmaker would become the arbiter of his own credibility and fairness. Id. at 259-60.

> In the present case it was necessary for the board to call upon their own personal knowledge and impression of what Keith had done or had failed to do because there were no other witnesses. The board had determined here from the very start Keith's performance as a teacher was not up to the highest calibre. It then called upon itself to judge the credibility of its own determination as to Keith's performance. We cannot comprehend how a board in this position could do otherwise than find itself to be composed of credible witnesses. Id. at 260.

The board also argued that it was the only body which could investigate the termination proceedings because neither the superintendent nor the principal had recommended that the teacher's contract be terminated. The court found that argument to be without merit. There were statutory provisions under which it would have been possible for either administrator to initiate termination proceedings, and, if either of these methods had been used, it may have been possible for the board to have been an impartial decisionmaker. Id. at 261.

When a teacher attempts to show that a hearing tribunal was unfair, it may be necessary to show more than a mere possibility of bias. Grissom v. Board of Education, 388 N.E.2d 398 (Ill. 1979) was an example of that proposition.

Grissom, a tenured teacher, had been dismissed by the board of education for cause. He had then filed for review. The circuit court and the appellate court had each affirmed the board's decision. On appeal to the state supreme court, the teacher raised a number of issues, including the assertion that he had been denied a fair and impartial hearing both because the board had been antagonistic towards him and because the board's attorney acted both as prosecutor and advisor to the board. Id. at 399. The court disagreed with that contention, although it did reverse on other grounds. Id. at 406.

The court dismissed the contention regarding the dual role of the board's attorney as both prosecutor and advisor to the board on hearing procedures as

irrelevant. It stated that the question was whether the board had fulfilled its proper function as established by the legislation. Id. at 399.

The statute in effect at that time gave a local board of education the responsibility for initiating and finalizing teacher dismissals for cause and the competence to act as a hearing tribunal if the teacher wanted a hearing. The court found that the procedure had been adhered to and that similar kinds of statutory procedures had survived constitutional challenge in Hortonville. Id.

However, the court went on to note that just because a procedure is found constitutionally sufficient, that would not preclude a teacher from demonstrating denial of due process by proving bias on the part of a board member. Withrow and Hortonville were cited for the propositions that the board members were presumed to be fair and that neither mere familiarity with the facts nor the prior taking of a position on a policy issue would disqualify a decisionmaker, but that special facts might exist to prove otherwise. Id. at 400.

The teacher contended that overwhelming bias had existed on the part of the board and cited some instances as evidence. He had been terminated once before when the program for which he had been hired had been discontinued, but he had successfully sued to be reinstated. Just prior to the latest termination, the board chairman had been asked if they were trying to get rid of Grissom again, to which he had replied, "What do you mean again? We never have stopped." The teacher also noted the following: the board sustained all nine of its attorney's objections, while denying or overruling 19 of his 24 motions or objections; one of the board members had reason to be biased because his son had been disciplined by the teacher; and one board member in the presence of another, had expressed the view to a prospective witness that the teacher was unreasonable and incompetent. Id.

The court did not find these examples to be persuasive. The board president's remarks were considered to be thoughtless and indiscrete, but hardly so substantial as to evidence a vendetta or an acceptable prejudice. Moreover, these remarks had been the only evidence of hostility on the part of the seven-member board. The teacher had failed to show that any other member had been biased, and the court required that more than the mere possibility of bias be shown. The court was also unable to say that the board had displayed unfairness to the teacher by acting favorably on only six of his motions or objections at the hearing. Id.

Although the general rule appears to be that a showing of actual bias is necessary to successfully contest an adverse decision by a board of education, under some circumstances a court may find that the probability or appearance of bias to be a sufficient basis to question a board's decision. Gonzales v. McEuen, 435 F. Supp. 460 (C.D. Cal. 1977) was such a case.

A number of high school students had been charged with having committed certain acts during a period of student unrest on campus. Hearings had been conducted by the board of trustees. The board had sustained the charges against the students, had found that there was just cause for expulsion, and had expelled the students for the remainder of the school year. The students had then brought suit in federal district court, alleging a denial of constitutional due process. Id. at 462-63.

The students' strongest and most serious challenge was to the impartiality of the board. They contended that because of the board's overfamiliarity with the case, the multiple role played by the school district's counsel, and the involvement of the superintendent with the board during the hearings, they had been denied their right to an impartial fact-finder. Id. at 463-64.

The court stated that although there was no doubt that a student charged with misconduct has a right to an impartial tribunal, there was doubt as to what that meant. It was noted that various situations had been identified in which experience teaches that the probability of actual bias on the part of the decisionmaker is too high to be constitutionally tolerable. The court then framed the question to be not whether the board was actually biased, but whether, under the circumstances, there existed probability that the decisionmaker would be tempted to decide the issues with partiality to one party or the other. Id. at 464.

It was contended that prior to the hearings the board had had access to information regarding the students' academic and disciplinary records and also met with school officials, and that this prior involvement had deprived students of the opportunity for a fair hearing. The court rejected this contention, citing Withrow and Hortonville for support, and went on to state that a school board would be remiss in its duties if it did not make some inquiry as to what was going on in the district for which it was responsible. Id.

It was clear that the attorneys for the district had served multiple roles for the board. They had prosecuted the charges in the expulsion proceedings and had advised the board prior to the hearings, although they had denied having advised the board during the proceedings themselves. The court noted both the difficulty in separating the two roles of prosecutor and advisor to the board and the reliance of the board on its counsel. The court believed that this placed the school district's attorneys in a position of intolerable prominence and influence, and that the confidential relationship between the attorneys and the board, reinforced by the advisory role of the attorneys to the board, had created an unacceptable risk of bias. Id. at 464-65.

The record also indicated that the superintendent had served both as an advisor to the board and chief of the prosecution team. He had sat with the board and had been present during its deliberations on the issue of expelling the students. Although it had been maintained that he had not actually participated in the deliberations, the court believed that whether he did or did not participate, his presence might have been an inhibiting restraint upon the board. Id. at 465.

The court concluded that the process utilized by the board was fundamentally unfair, and that this raised a presumption of bias. The court stated that in view of the alternatives provided by statute for the selection of an impartial hearing body, it would have been more reasonable to provide procedures that insured not only that justice was done, but also that it appeared to have been done. Id. at 465-66.

Because of the presumption of bias, the court reviewed the evidence under the standard of clear and convincing proof rather than the ordinary substantial evidence test. Id. at 466. Although some of the students were denied relief, a number of the expulsions were set aside. Id. at 471-72.

Public School Superintendents

There are some special characteristics involved in the relationship between a superintendent and a board of education. These characteristics must be taken into account in regard to both the initiation of termination proceedings and the particular kinds of bias that are inherent in an unsatisfactory superintendent-board relationship. The following cases are illustrative.

Fuentes v. Roher, 519 F.2d 379 (2nd Cir. 1975) involved a dispute between the superintendent and the board of education in a New York City community school district. There had been a great deal of controversy involved in school board politics, and the board was split into two factions. The superintendent's

tenure had been a stormy one; although he had had the support of one board faction, he had been involved in open disputes with members of the other. Id. at 381.

Although the statutes had provided little protection for a community superintendent, in this instance the superintendent had been given by contract the procedural protections afforded by statute to tenured teachers and supervisors. Included were the right to an adversarial hearing and a right of appeal on the record from the community board to the city board and then to the state commissioner of education. The superintendent's contract also provided that the board would have the power to initiate charges, to appoint a hearing examiner, and to act on the examiner's report. Id. at 383.

The members of the majority faction with whom the superintendent had been at odds had voted to suspend him and initiate dismissal proceedings. The board had appointed both a hearing examiner and an attorney to prosecute the charges. Among the numerous charges had been references to the superintendent's involvement in school board election political activity and to various instances of unsatisfactory conduct on the part of the superintendent toward some of the board members. Id. at 382-83.

Fuentes had sued in federal court to enjoin his suspension and the administrative dismissal proceedings, alleging violations of his constitutional rights. The district court had dismissed the claims, and the circuit court of appeals affirmed. Id. at 391.

The superintendent contended on appeal that the combination of functions performed by the board failed to comport with due process. He contested the procedures whereby the board had initiated the charges against him, had appointed a lawyer to prosecute them before a hearing examiner, had provided at least some

of the evidence relevant to their determination, and would ultimately pass on the examiner's recommendation. Id. at 388.

The court believed that this claim was largely disposed of by Withrow. In view of that holding the court saw

> little reason to question as an abstract matter the procedural fairness of the combination of functions performed by the school board in this case, at least where as here there is an initial hearing by an independent hearing examiner and full review of the board's decision by the commissioner of education. Id.

Fuentes also maintained that, because they had been the target of his personal abuse and criticism, several of the board members were impermissibly biased and had prejudged his case. The court noted that it was well established that the probability of bias on the part of a decisionmaker may be too great to be constitutionally tolerable when he has been the target of personal abuse or criticism by the party before him. It was also believed that it would be difficult for a board-member decisionmaker to give a detached judgment when it was his testimony which provided a substantial part of the case. Id. at 388-89.

However, the court pointed out that this case, involving the dismissal of an employee by his immediate superior, was quite unlike the more detached relation so necessary between judge and defendant or even between school board and teacher. Different considerations were involved for positions in public employment in which the relationship between superior and subordinate is of such a close nature that public criticism would damage the working relationship between them. In such cases, the employee's supervisor is the person best informed about the cause for termination. Furthermore, to bypass the immediate superior in the first instance in favor of a more detached decisionmaker would often require going outside the agency before a dismissal could be effected. Id. at 389.

The court emphasized that it was not holding that final action by one so immediately concerned as the board members involved in this case would be permissible. Here there had not only been a full adversarial hearing with a hearing examiner before the board could officially act on the dismissal, but there was a right to appeal an adverse decision to the city board of education and then to the state commissioner. Under those circumstances, the court was unable to find a deprivation of procedural due process in the assertion of prejudgment or bias on the part of the members of the board. Id. at 389-90.

In Staton v. Mayes, 552 F.2d 908 (10th Cir, 1977), cert denied, 434 U.S. 907 (1977) an Oklahoma board of education had dismissed a superintendent during the term of his contract. He had filed suit in federal court, alleging a denial of due process. The district court had dismissed the action, Id. at 909-10, but on appeal, the circuit court vacated and remanded. Id. at 916.

Staton's most substantial claim of denial of due process was that the board of education had been a biased tribunal. Id. at 912-13. Two of the five members of the board had voted before not to renew his contract, but they had always been outvoted. They had also indicated in discussions with another board member just before the dismissal action at issue in this case that they wanted a different superintendent. They had then been joined by a newly-elected board member, who had stated during his campaign that he would vote for a change in superintendent. The board had promptly initiated termination proceedings, and after a hearing, had voted to dismiss Staton. Id. at 910-11.

At trial, each of the three testified that he had not been irrevocably committed to termination, but had required proof of the charges, and that he had based his decision on the evidence produced at the hearing. Id. at 913-14.

The court of appeals stated the fundamental principle that a fair trial in a fair tribunal is a basic requirement of due process, and that fairness requires

an absence of actual bias. It also noted that due process is a flexible concept, and that in determining what process is due, both the individual's stake in the decision and the state's interest in a particular procedure for making it must be taken into account. Id. at 913.

The state was found to have an obvious interest in the particular procedure for the removal of school personnel; at the time of the hearing, the board was the only body empowered to employ and dismiss. The court acknowledged that in a previous case it had said that out of necessity, disqualification will not be permitted to destroy the only body with the power to act. It was also noted than an individual such as the superintendent has a profound interest in the fairness of the hearing tribunal whose decision may jeopardize his property and liberty interests, and that in considering the matter of fairness those circumstances must be taken into account. Id.

The court found that because of the statements which had been made by the board members before the hearing, this tribunal had not met the demands of due process.

> These were not mere statements on a policy issue related to the dispute, leaving the decision maker capable of judging a particular controversy fairly on the basis of its own circumstances. . . . Nor was this simply a case of the instigation of charges and a statement of them during an investigatory phase by the body that will later decide the merits of the charges. . . . Instead this case involves statements on the merits by those who must make factual determinations on contested fact issues of alleged incompetence and willful neglect of duty, where the fact finding is critical. . . . The hearing involved the possibility of an erroneous and unfair factual decision which was absent in Hortonville, where the basic facts were admitted. Id. at 914.

The court acknowledged that disqualification or an alternate tribunal had not been provided for at the time of the hearing and that there had been the rule of necessity to consider. However, since that time the legislature had provided for appeal remedies after a board decision, with full hearing and review on the facts by other agencies. The court noted that if the board

decided to proceed again with removal procedures, the means were now available for a full review of a termination decision by other tribunals. Id. at 915.

A dissenting judge would have applied the rule of necessity as stated in a previous case. It was his view that, regardless of any alleged pre-hearing bias or prejudice, an appellate court should simply examine a complete record of the administrative proceedings to determine whether procedural due process was accorded and whether there is substantial evidence in support of the board's findings and conclusions. Id. at 917.

Welch v. Barham, 635 F.2d 1322 (8th Cir. 1980), (U.S. appeal pending) resulted from the abrubt dismissal of an Arkansas administrator. Shortly after the school board had rehired Barham as superintendent, a serious disagreement had developed between them. The dispute involved his outside activities, his management of the district's financial affairs, and his defense of his school expenditures in a newspaper article. A special meeting had been called to discuss the matter, and after Barham had refused to resign, the board had initiated termination proceedings. Id. at 1323-24.

At the hearing the board had produced evidence and Barham had testified in his own defense. He had denied none of the essential facts underlying the charges; rather, he had argued that his actions were justified and did not warrant termination. After the hearing, the board had voted four to one to discharge him. Id. at 1324-25.

Barham had then sued in federal court, alleging violations of his constitutional and contractual rights. The district court had concluded that because the board had not been sufficiently impartial, there had been a violation of due process. Id. at 1325.

The trial court had based its decision on the responses given to hypothetical questions posed to the board members at the trial. Barham's attorney

had asked each of the four board members who had voted for termination if the superintendent could have done anything at the hearing that would have gotten them to decide differently. Two of the board members answered that they did not think so; the other two were somewhat equivocal. The district court concluded that if two of the four members would not have changed their minds under any circumstances, then the hearing had been useless to Barham. Id.

The circuit court of appeals reversed. On the basis of the record as a whole and the policy considerations discussed in Hortonville, the court concluded that the testimony had not demonstrated the degree of bias that disqualifies a decisionmaker who is entitled to a presumption of honesty and integrity. Id. at 1325-26. At the hearing Barham had neither changed his position on the charges nor presented any new evidence in his defense. The hypothetical question had required each board member to speculate whether anything could have changed his mind and to imagine what evidence might have changed his decision. The court found that the record as a whole demonstrated that the board members had tentatively, but not irrevocably, formed an opinion concerning Barham's termination based on their previous official involvement with him, and that such evidence was insufficient to permit a finding of bias or improper judgment. Id. at 1327-28.

A dissenting judge argued that this case did not involve mere familiarity with the evidence or a policy issue related to the dispute, but rather that there had been a number of factual issues to decide. In his view, the findings of the district court had not been clearly erroneous, and the decision should have been affirmed. Id. at 1328-29.

III. CONCLUSION

A fair trial in a fair tribunal is a basic requirement of due process. When parties who have been adversely affected by the decisions of an educational governing board challenge those actions, they often contend that the tribunal was unfair. However, a judicial determination that the governing board was so unfair that the contested decision must be overturned is seldom found.

An educational governing board is presumed to have acted fairly in its quasi-judicial capacity. To overcome this presumption, it has generally been necessary for a challenger to prove that there was such bias on the part of the board that a meaningful hearing or an objective decision was not possible. However, it should be noted that in some instances the appearance of a biased tribunal may be sufficient cause for a court to intervene, especially if there are other means available that would provide more procedural protection for the affected party. If such other means are not available, then the "rule of necessity" may become operable. A court will generally be quite reluctant to disqualify the only body with the power to act.

However, it must be noted that each case will tend to turn on its own facts. It is also important to be aware of any statutes or institutional policies that might be relevant to these issues.

Boards of education and the administrators who advise them should make every effort to provide fair procedures that will promote reasonable decisions. Such an approach is consistent with both the law and good educational management, and the interests of all the parties involved will be better protected.